SUPREME COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 579

UNITED NUCLEAR CORPORATION,
a Delaware Corporation,
Petitioner,

v.

MOKI OIL & RARE METALS COMPANY,
a New Mexico Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS; TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent adopts for purposes of this Brief in Opposition, the material in the Petition for Writ of Certiorari by United Nuclear Corporation under the headings "Opinion Below", "Jurisdiction", "Question Presented", "The Statute Involved", and "Statement of the Case". Respondent's adoption of the material in the Statement of the Case is for the

purposes of this Brief in Opposition only, and Respondent would in brief and argument on the merits of this cause take substantial exception to the form of the Statement of the Case, the omission by Petitioners of the many factors relied on by the Court of Appeals, and the nature of the setting forth of the facts stated therein.

ARGUMENT

The determination of the question presented in this cause is a fact question to be determined from all the relative evidence. It is respectfully submitted that the standards for determination of this fact question have been well developed by the Circuit and District Courts of the United States, and as each case must be determined on its own facts, there is no significant principle of law which could be decided or settled by the Court's acceptance of this cause for decision.

Although a mechanical review of the decided cases may show what appears to be a conflict between the Circuits, proper analysis and the placement of the cases in proper and appropriate fact categories resolves the apparent conflict, and shows consistent and relatively simple rules for making the factual determination.

There are essentially three types of corporations whose principal place of business have been presented for determination by the courts in connection with subsection (c) of Section 1332, 28. U.S.C. The first are those which have essentially a single business purpose and whose physical activities, be they making soil pipe, running a summer camp, selling groceries, or mining iron, are carried on in a single

state. E.g., *Anniston Soil Pipe Co. v. Central Foundry Co.*, 216 F. Supp. 473 (N.D. Ala. 1963); *Aron v. Indemnity Ins. Co. of North America*, 200 F. Supp. 147 (N.D. Ill. 1961); *Huggins v. Winn-Dixie Greensville Inc.*, 233 F. Supp. 667 (E.D.S.C. 1964); *Mattson v. Cuyuna Ore Co.*, 180 F. Supp. 743 (D. Minn. 1960); *Spector v. Rex Sierra Gold Corp.*, 227 F. Supp. 550 (S.D.N.Y. 1964). The contact with any other state in these cases is frequently on a formalistic, rather than a realistic or genuinely active basis. For example, one case involved a subsidiary corporation engaged exclusively in selling products of the parent. All of its selling activities, sales personnel and operative personnel were located in New York; all of its directors and officers who were also directors and officers of the parent, lived and met and functioned entirely in Michigan. *Inland Rubber Corp. v. Triple A Tire Service, Inc.*, 220 F. Supp. 490 (S.D.N.Y. 1963). The contact with Michigan was nearly as formalistic as if its sole contact consisted of the fact that Michigan was the state of incorporation. See *Huggins v. Winn-Dixie Greensville, Inc.*, cited *supra*. The Huggins case presents much the same activity versus formal relationship.

Within this first category of cases are also those corporations which do have some "physical activities" carried on in states other than the principal state but such physical activities in other states were merely incidental to the activities carried on in the principal state. A good illustration is the case in which the corporation operated a three-month summer camp in Wisconsin and had a nine-month business office in Chicago to promote the camp and enlist campers. *Aron v.*

Indemnity Ins. Co. of No. America, cited *supra*. Other cases were presented by those corporations engaged in heavy manufacturing or mining having well-established markets where little sales or management effort is needed to open up or expand the sales market or to develop new product lines, E.g., *Anniston Soil Pipe Co. v. Central Foundry Co.*, cited *supra*. The solution to these cases are not troublesome, nor are the results the courts have consistently reached in finding the place of physical activity to be the principal place of business surprising.

The second class of case is the slightly more complicated case of the corporation which engages in essentially one type of activity, such as running a railroad, flying airplanes or gathering and disseminating news, but its physical activity is carried on over a large area encompassing a number of states. E.g., *Egan v. American Airlines, Inc.*, 324 F. 2d 565 (2nd Cir. 1963); *Sabo v. Standard Oil Co. of Indiana*, 295 F. 2d 893 (7th Cir., 1961); *Riley v. Gulf, M.&O.R. Co.*, 173 F. Supp. 416 (S.D. Ill. 1959); *Herschel v. Eastern Airlines, Inc.*, 216 F. Supp. 347 (S.D.N.Y. 1963); *Bryfogle v. Acme Market, Inc.*, 176 F. Supp. 43 (E.D. Pa. 1959); *Campbell v. Associated Press*, 223 F. Supp. 151 (E.D. Pa. 1963). In this class of cases the courts are not so much impressed with the volume of physical activity carried on within a given state as they are with the locus of direction, control, management, and policy-making on the operational level.

The third class of case is that of the multiple activity, multi-purpose, multi-state entity such as is involved in the present case. E.g., *Kelly v. United States Steel Corp.*, 284 F. 2d 850

(3rd Cir. 1960); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y.) 1959); *Lancer Industries, Inc. v. American Ins. Co.*, 197 F. Supp. 894 (W.D. La. 1961); *Textron Electronics, Inc. v. Unholtz-Dickie Corp.*, 193 F. Supp. 456 (D. Conn. 1961); and *Herriman Irr. Co. v. United States Smelting, Refining & Mining Co.*, 237 F. Supp. 31 (D. Utah 1964). As the Court of Appeals for the Tenth Circuit concluded in the present case, the test in this third class of cases has uniformly been the state "from which centralized general supervision of all of its business is exercised" The following quote from the *Kelly* case, which is urged by Petitioner as being in conflict, clearly indicates no conflict with this analysis:

> "After balancing these important and significant facts with those pointing to Pennsylvania, we reach the conclusion that Pennsylvania and not New York is the principal place of business. It is in Pennsylvania that the Operation Policy Committee sits and conducts its affairs. The Board of Directors has delegated to this committee the duty of conducting the business of the corporation relating to manufacturing, mining, transportation and general operation. It is composed of the Chairman of the Board, the President, the Chairman of the Finance Committee, the General Counsel and the seven Executive Vice Presidents. It makes policy decisions, of course subject to the Board of Directors. It appoints division presidents and corporate officers through the bank of Administrative Vice President. The seven Executive Vice Presidents, one at the head of each of the seven great branches of the corporation, have headquarters and staffs in Pittsburgh. All but one of the seventeen Administrative Vice Presidents and twenty-two out of the twenty-five Vice Presidents are located in Pittsburgh with their staffs. So, too, is the General Solicitor and his staff. In Pennsylvania almost thirty-four percent of the employees classified as ex-

empt under the Fair Labor Standards Act (29 U.S.C.A. §201 et seq.) are located. This is fourteen times as many as there are in New York.

"All this points to us the conclusion that business by way of activities is centered in Pennsylvania and we think it is the activities rather than the occasional meeting of policy-making Directors which indicate the principal place of business.

"To this center of corporate activity we may add some other facts having to do with physical location of employer's plants and the like. We think these elements are of lesser importance, but added to the items already enumerated pointing to the center of corporate activity, we think they have some significance." (at page 854)

CONCLUSION

It is respectfully submitted that based on the facts of this case, the decision of the Court of Appeals was correct and in accordance with the uniform standards established by the decisions of the Courts of the United States. Each fact situation presents its own peculiar circumstance and must be decided on its facts in line with the consistent analyses provided by the case law. In view of the lack of conflict between the Circuits and the factual nature involved in this determination, it is respectfully submitted that this cause is inappropriate for the granting of Petition for Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I, Hubert D. Johnson, one of the attorneys for Moki Oil & Rare Metals Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on October 18, 1966, I served copies of the foregoing Memorandum on Petitioners by depositing the same in the United States mail box, with air mail postage prepaid, addressed to counsel of record for United Nuclear Corporation at the following post office addresses:

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